No. 87-1212

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

In the Matter of the Application of JEROME GREENE, NORMAN PECK, AND PETER SHARP,
Appellants,
against
MANUEL MIRABEL, DEPUTY COMMISSIONER, NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Appellee.
New York County Clerk's Index No. 16717/85

In the Matter of the Application of JEROME GREENE, NORMAN PECK, AND PETER SHARP,
Appellants,
against
MANUEL MIRABEL, DEPUTY COMMISSIONER, NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Appellee.
New York County Clerk's Index No. 16718/85

In the Matter of the Application of NORMAN PECK,
Appellant,
against
MANUEL MIRABEL, DEPUTY COMMISSIONER, NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Appellee,
VICTOR BONOMO, CHARLES HERMAN, JOHN D. GREEN, LAZAR AND LEA GOTTFRIED, BERNARD GOLDEN, RAY BERMAN, HOWARD SHAVEL, JAMES L. MARCUS, HYMAN SUTTON, MICHAEL FREEDMAN, LESTER LOCKWOOD, PAUL WEISSMAN AND SONIA REESE,
Appellants.
New York County Clerk's Index No. 16719/85

ON APPEAL FROM THE SUPREME COURT, STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM
QUESTIONS PRESENTED

1. Whether the New York State Court of Appeals properly dismissed, sua sponte, appellants' appeal upon the ground that no substantial consitutional question is directly involved.

2. Whether the Appellate Division, First Department of New York properly rejected appellants' contention that the New York City Rent Control laws, by limiting rent increases based purely upon financial return to these appellants from their unsold cooperative shareholder interests in rent controlled apartments to seven and one half percent (7 1/2%) per annum, constitutes a taking without just compensation, by affirming the .

determination of the Supreme Court of the State of New York.

3. Whether the state in the exercise of its police power to protect the public welfare, in the face of an acute housing shortage, by regulating rents in residential dwellings in order to prevent the exaction of unjust unreasonable and oppressive rents, has enacted a rent control plan that is rationally related to legitimate state interest.

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PRELIMINARY STATEMENT

Appellee moves to dismiss the appeal taken to this Court from the final order and judgment of the Appellate Division, First Department of New York entered in this action on April 7, 1987, or in the alternative to affirm said order. The New York Court of Appeals twice refused to review the matter. (infra.)

OPINIONS BELOW

The decision of the Supreme Court, New York County, was not reported, but a copy of the transcript of the oral argument is reproduced in the appellant's appendix (App. A, pp. 1a-10a).

The Appellate Division, First Department, by order dated April 7, 1987, affirmed without opinion, a copy of that order is reproduced in the appellant's appendix (App. B.)

The New York Court of Appeals, by order dated July 9, 1987, dismissed the appellant's notice of appeal, sua sponte, upon the ground that no substantial constitutional question was directly involved. A copy of that order is reproduced in the appellant's appendix (App. C).

Appellants' motion for leave to appeal to the New York Court of Appeals was denied by order dated October 13, 1987, a copy of which is reproduced in the appellants' appendix (App. D).

JURISDICTION

Appellants' claim that this Court may take jurisdiction pursuant to 28 U.S. Code §1257 (2) and 2101(c).

ARGUMENT

This case does not raise a substantial federal question warranting an appeal to the United States Supreme Court.

The United States Supreme Court has previously and consistently rejected the contentions made by appellants that the rent regulatory laws constitute a taking of property without just compensation, and appellants have failed to provide any reason for a different conclusion in the case at bar. See Kaplan v. Prince, 444 U.S. 938, 62 L.Ed. 2d 304 (1979) which this Court dismissed for want of a substantial federal question. Rather, Appellants would ask this Court to overturn state legislation because it

does not allow them to make as much of an immediate profit on their cooperative shareholder interests in as yet unsold apartments as they would like. In demanding instantaneous achievement of the statutory return the shareholders would ask this Court to ignore the pronouncements of both the New York State Legislature in L. 1962, Ch. 21, Sec. 1(2) (State Enabling Act):

> The legislature hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons in the state of New York which emergency was created by war, the effects of war and the aftermath of hostilities; that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases

> in rents; that there continues to exist an acute shortage of dwellings; that unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare..." (emphasis added)

and the City Council of New York in N.Y.C. Admin. Code Title Y, Ch. 51, Sec. 1.0 which is nearly a verbatim reiteration of Sec. 1(2) of L. 1962, Ch. 21.

A. Emergency Situation Continues to Exist

Moreover, it should be emphasised that every few years New York State legislative action has passed and extended the period of rent control after surveys, public hearings, and

other legislative consideration of the continued need for rent control by reason of the extreme shortage of housing. The most recent of these finding a continued need for rent control is, Chapter 65 of 1987 Session Laws, effective May 13, 1987 extending the provisions of the emergency housing rent control law by stating, "The provisions of this act, and all regulations, orders and requirements thereunder shall remain in full force and effect until and including June fifteenth, nineteen hundred eighty nine". (Emphasis added).

B. Statutory Limitations

The Appellants herein, owners of shares of stock in cooperative corporations attributable to certain

unsold rent-controlled apartments, request rent increases above the annual increments of 7 1/2% to be immediately collectible, statutory provisions to the contrary notwithstanding.

Appellants complaint, despite any characterization to the contrary, is only the latest of perennial attacks on rent control instigated and financed by real estate interests. It is moreover argued that the Appellee adopted a certain "methodology" in administering the rent laws. The Division of Housing and Community Renewal did not adopt sua sponte a yearly limitation on allowable rent increases, rather it is following the statutorily prescribed limit. Appellants apparently hope to have the Courts substitute their own judicially

fashioned system of rent controls to replace that designed and enacted by the legislature.

The rent control laws for the City of New York provide, since the enactment of L. L. 30 of 1970, for a statutory limitation of 7 1/2% per year, as the rate at which rents of rent-controlled apartments may escalate. A pertinent exception to this limitation is allowed in those instances where a greater increase is necessary to bring the earned income of the "property" at least to a level equal to its operating expenses. The rent agency herein, ordered increases in the rents of the unsold, tenant occupied rent controlled apartments in these cooperatively owned buildings up to the statutory 7 1/2 %

per annum limitation on rent increases and beyond 7 1/2% in those apartments where the particular individual operating expenses exceeded earned income.

The system does not produce an irrational result or deprive appellants of their constitutional rights, but seeks to balance the interests of landlords while preventing precipitous rent hikes in order to prevent uncertainty, hardship and dislocation to tenants.

Local Law 30 of 1970 for the City of New York, was enacted to amend the rent law and introduced the concept of ongoing annual rent increases to the rent control system. This system (MBR)

is designed to bring about the massive delivery of new and higher rents, to prevent disinvestment by landlords, and yet to prevent wholesale tenant dislocation by virtue of precipitous rent increases. Mayer v. City Rent Agency, 46 N.Y. 2d 139 at 145, 412 N.Y.S. 2d 867, at 869. Pursuant to the law, as amended, combined rent increases under the provisions of the MBR system (N.Y.C. Admin. Code, Section Y51-5.0a(3), the City Rent Law) and the "Net Annual Return" (hardship) provisions of the law (Section Y51-5.0g(1)(a), may not exceed 7 1/2% per year, with specified exceptions. The City Council in amending the New York City rent law was mindful of the balance to be struck during the continuing housing emergency between the need to protect the citizens of New York

City from excessive inflationary rates of rent increase along with the need to allow landlords rent increases to permit the attainment of an 8 1/2% rate of return on the capital value of their property. 89 Christopher Inc.v. Joy, 35 N.Y. 2d 213, at 217, 360 N.Y. S. 2d 612 at 615.

As noted, the rent laws even make provision for a situation where a landlord operates at a loss to obtain rent increases in excess of 7 1/2% per year.

Section 2202.3(d)(2) of the Rent Regulations (formerly, Section 33d(2), specifically provides for the waiver of the limitation where a greater increase is necessary to make the earned income

of the property equal to its operating expenses.

Relevant provisions of the Rent and Eviction Regulations for New York City mirror the 7 1/2% increase limitation of the law. Thus, Section 2201.6 (9 N.Y.C.R.R. 2201.6), formerly Section 26, provides:

> (a)(1) No new maximum rent established pursuant to section 2201.4 of this Part, or adjustment pursuant to section 2201.5, 2202.7, 2202.8, 2202.9 or 2202.10 of this Title, or any combination thereof, shall increase the rent collectible from a tenant in occupancy by more than 7 1/2% in any one calendar year, except as provided in section 2202.7 of this Title.

Like its counterpart in the Rent Control Law, the "Return on Capital Value" provisions of the Rent Regulation does not contemplate an immediate, disruptive, and precipitous jump in a protected tenant's rent to permit achievement of an instantaneous 8 1/2% return on capital value. Rather, a landlord is to file an application for "an increase in maximum rents," statutorily limited in applicability by Section 2201.6 of the implementing Regulations (supra), only when he is not receiving rental income sufficient to attain a return of 8 1/2% on capital value. 241 East 22nd St. Corporation v. City Rent Agency, 33 N.Y. 2d 138 at 143, 350 N.Y.S. 2d 631 at 638. See Section 2202.8 Return on Capital Value.

Here the appellants would have this Court focus on but one aspect of the rent control program rather than the overall aim of establishing a system in which building rents reflect the costs of properly operating maintaining and financing buildings, as well as upgrading the housing stock by tying rent increases to acceptable maintenance standards.

C. Police Power as basis of rent controls.

In Bowles v. Willingham, 321 U.S. 503, 88 L.Ed 892 (1944), the Court upheld the constitutional validity of the federal rent control system as a valid exercise of the police power, even if some landlords would thereby not only not receive a "fair and equitable"

return, but would actually suffer economic losses as well as depreciation in the value of their property.

Only recently this Court again had an opportunity to review a constitutional challenge on a California rent ordinance in Pennell v. City of San Jose, decided February 24, 1988, rejecting the appellant's claims under the Due Process and Equal Protection Clauses of the 14th Amendment, specifically stating:

> We also find that the Ordinance does not violate the Amendment's Equal Protection Clause. Here again, the standard is deferential; appellees need only show that the classification scheme embodied in the Ordinance is "rationally related to a legitimate state interest."

Demonstrably the New York City system is completely distinguishable from the "San Jose" formula which takes into consideration the tenant's hardship. The New York City Rent and Rehabilitation Law contains a reasonable classification related to the legislative purpose sought to be achieved, and is applied equally. Every landlord of a rent-controlled apartment in the context of the underlying proceeding herein is subject to a 7 1/2% per annum limitation on rent increases and every landlord is entitled to the benefit of the same exceptions should he qualify for them under standards applicable to all.

The rent control law and challenged procedures, which are well settled, have been legislatively reviewed with great

care every 2-3 years since 1950, and each time with considerable public debate and with considerable participation by articulate landlord and tenant groups.

The rent control laws have also repeatedly been reviewed by the Courts and upheld as constitutional, Eisen v. Eastman, 421 F. 2d 560 (2d Cir., 1969); cert. den. 400 U.S. 841, 91 S. Ct. 82, 27 L. Ed. 2d 75 (1970); Clive Knowlson v. Joy, 78 Civ. 2685 (S.D.N.Y. Feb. 23, 1979) (not officially reported); Israel v. City Rent and Rehabilitation Administration, 235 F. Supp. 908 (S.D.N.Y. 1968); Davenport v. Berman, 68 Civ. 1984 (S.D.N.Y. July 28, 1969); aff'd 420 F. Supp. 294 (2d Cir.), cert.

den. 401 U.S. 956, 28 L.Ed. 2d 240, 91 S.Ct. 978 (1971).

D. The rent control laws do not unconstitutionally "take" property

Appellants' argument that the rate of return on investment allowed by the rent laws is so low as to amount to a "taking" in contravention of the constitutional guarantee against deprivation of property without due process, is facially illogical and specious. That constitutional guarantee protects individuals from direct governmental appropriation of property. It does not insulate one from the effects of -even consequential injuries from- lawful regulation. Basin, Inc. v. Federal Energy Admin., 552 F. 2d 931, 938 (Temp. Em. Ct. Apps. 1977), cert.

den. 434 U.S. 821; Condor Operating Co. v. Sawhill, 514 F. 2d 351 (Temp. Em. Ct. Apps. 1975), cert. den. 421 U.S. 976.

In Benson Realty Corp. v. Koch, 449 U.S. 1119, 67 L. Ed.2d 106, 101 S. Ct. 933, ruled on by this Court, appellants there as here argued ,inter alia, that the rate of return on investment allowed by the rent laws was so low as to amount to a taking in contravention of the constitutional guarantees against deprivation of property without due process of law. In Benson the New York State Court of Appeals wrote:

> On the question of unconstitutional taking, it need only be noted that plaintiff's papers contain only generalized conclusions which, however persuasive in the forum of public

> opinion, do not establish that the property of any individual property owner as been "taken" or demonstrate sufficiently to overcome the presumption of constitutionality, that rent control is the cause of what plaintiffs claim is the present plight of New York City landlords.

In a similar vein in Hartley Holding Corp. v Gabel, 13 N.Y. 2d 306, 247 N.Y.S. 2d 97 (1963), a landlord claimed he was being deprived of his property without due process where the rent law then provided for a rent increase if he were earning less than 6% of the value of his property, value being defined in the rent law. In finding that the landlord's constitutional rights were not infringed that Court ruled (Desmond, Ch. J.): "...since separate fixation of reasonable rent, landlord by landlord,

was impossible, a generally fair and equitable method of fixation on a class by class basis was adequate..." (citations omitted).

In Oriental Boulevard Co. v. Heller, 58 Misc. 2d 920, mod. 34 A.D. 2d 811, aff'd 27 N.Y. 2d 212, 265 N.E. 2d 72, appeal dismissed 91 S.Ct. 1234, 401 U.S. 986, 28 L.Ed. 2d 527, the New York State Court of Appeals in dismissing a constitutional challenge noted that "plaintiffs had the burden of overcoming that presumption by an evidentiary showing that the statute is unconstitutionally oppressive as applied to them personally..."

Nor does the case of Hall v. City of Santa Barbara, 797 F. 2d 1493 (9th Cir.,

1986), modified and reh'g en banc denied, 813 F. 2d 206 cited by appellants lend the support claimed. Rather, that matter dealt with tenants of mobile homes who received the right to a perpetual lease at a below market rental rate. Specifically the Court noted that the ordinance "directs the landlord to give tenants a lease, a recognized estate in land, lasting indefinitely. Moreover, the landlords residual rights in the property are largely at the mercy of the tenants." In that instance the Court was disturbed by the fact that the tenants were in a position to reap a windfall profit, as the ordinance restricted the park owner's ability to evict tenants or require them to remove their mobile homes from the park upon sale. The New

York rent control laws bear no relation to that system, appellants argument to the contrary not withstanding.

Appellants also rely on First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California 107 S. Ct. 2387 (1987) in support of its proposition that rent control laws violate the constitutional protection of property rights. However, that case is also inapposite and deals with an actual "taking" of the property, denying the appellants all use thereof. Specifically the State prohibited the Church from using the property involved for a period of time. In that case this Court held that the actual "taking", although not permanent, was compensable. These instances deal with the right to use and

dispose of land. To attempt to analogize these facts to the instant case is absurd. By no stretch of the imagination is this situation similar to that in New York under the rent control laws. In the matter now before the Court there exists no "taking".

Appellants further cite Helmsley v. Borough of Fort Lee, 78 N.J. 200, 394 A.2d 65 (1978), app. dismissed, 440 U.S. 978, and Fisher v. City of Berkeley, 89 L. Ed. 2d 206, 106 S. Ct. 215. The rent control system in the City of New York is all together different from the ones found deficient in California and New Jersey. In "Helmsley" the New Jersey Supreme Court found the Fort Lee rent control ordinance provided in entirely

inadequate "hardship" mechanism similar to the one condemed in California.

The validity of the Berkeley ordinance was in question because for over 17,000 apartment rental untis there was only one part-time Board which could hold only one hearing at a time. The absolute absurdity of this scheme was spelled out at length in Birkenfeld v. City of Berkelely 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001 (1976) at pp. 492-496. The result in the city of Berekeley was that all landlords (with the exception of a "lucky few") suffered an absolute, automatic indefinite rollback in rents. Thus the imposition of a rollback and freeze of indefinite duration would in many cases become confiscatory (Sup., 130 Cal. Rptr. at p.

494), an unconstitutional frustration of the purposes of the statute. As this Court said in 1986 in Fisher v. Berkeley, 89 L. Ed. 2d 206, 106, S. Ct. p. 215-217 in discussing the Berkeley finding:

> Rather, the decision stands only for the proposition that cities must couple rent control with procedures for adjusting rent ceilings to avoid fixing rents at confiscatory levels. 17 Cal. 3d, at 167-173, 550 P2d, at 1028-1033. Birkenfeld thus left Berkeley's basic power to impose rent controls unaffected.
>
> (emphasis added)

In Bucho Holding Co. v. Temporary State Housing Rent Commission, 11 N.Y. 2d 469, 230 N.Y.S. 2d 977 (1962), cited by appellants on page 17 of their brief, the New York Court of Appeals upheld as constitutional the state rent control

law, which provided for gradual rent increases with the ultimate ceiling of allowing landlords a then six percent return on capital value. It should be underscored that the City Rent Control Law at that time did not include the annual MBR increases which in conjunction with a biennial upward adjustment of MBR ceilings is a key feature of the current New York City Rent Control Law here under attack in this proceeding.

In I.L.F.Y. Co. v. City Rent and Rehabilitation Administration, 11 N.Y. 2d 480, 230 N.Y.S. 2d 986 (1962) also cited by appellants, the New York Court of Appeals specifically upheld the constitutionality of the "net annual return" provisions of the City Rent and

Rehabilitation Law, which ,inter alia, limited increases to 7 1/2% per year toward a goal of, at that time a 6% net annual return on the value of the property. Once again it should be emphasized that the law in effect at the time did not include the 1970 amendments which substantially eased rent-control restrictions. In its opinion the Court further found that landlords were not constitutionally entitled to the then 6% annual return stating specifically: "The question of the precise return to which a landlord is entitled has, as demonstrated, been the subject of constant legislative revision. The "4" and "2" return, as well as the "6" and "2" return is well within the constitutional limits - and this is so even though the "6" and "2" return must

be discounted by the enforced waiting period."

_(emphasis added)

E. Greenspan Affidavit

With regard to the Greenspan affidavit (Jurisdictional Statement p. 10) made and advanced long after the administrative record underlying the determination here under challenge was closed, the opinion of the affiant Dr. Greenspan, first surfaced upon appellants challenge to the administrative orders in the New York Supreme Court, and thus was not properly before the State Courts. Section 26-411 (Judicial Review) of the Administrative Code of the City of New York (City Rent Control Law) (formerly Section Y-51-90a(2), N.Y.C. Administrative Code). The statutory proscription translates easily

into judicially endorsed principles, succinctly restated by a unanimous Court in Matter of Fanelli v. New York Conciliation and Appeals Board et. ano, 58 N.Y. 2d 952, 460 N.Y.S. 2d 534 , 447 N.E. 2d 82 (1983), aff'g 90 A.D.2d 756, 757, 455 N.Y.S. 2d 814, 816.

Even were the law to be to the contrary and the Greenspan affidavit was to be considered, it consists of speculative and conclusory opinions which are irrelevant to the issue before the Court. Dr. Greenspan from the economists vantage point opines that "the orders of the rent control administrators...[lead to a result that]...is in effect a taking of property without due compensation.", advancing an economists predicate for

the conclusion in law which he thus arrives at.

F. New York's rent control system provides no basis for Appellants' charge that the system deprives them of their property without just compensation

We here underscore that the current rent levels of which Appellants complain and which they now seek to impermissably inflate, are due to the appellants' failure to seek allowable rent increases in prior years. Their failures and those of their predecessors in interest to seek or obtain rent adjustments in rent control both during and prior to the conversion from rental to cooperative ownership has led to their alleged need for a "quick-fix". This circumstance is hardly the fault of the

rent control laws, or the agency which administers them.

Appellants contend that had they previously applied for and obtained rent increases their circumstances would remain unchanged today. Their contention is self-serving and misleading. Earlier increase applications could well have increased their rent computation base for MBR purposes; active and timely pursuit of MBR increases could have obtained 7 1/2% rent increases for them in 1980 and 1981.

Further their inaction led to the forfeiture of rent increases both in MBR and "fuel cost passalong". In the 325 West End Avenue building they failed to

obtain the 1984 cumulative fuel cost adjustment which they were found to be entitled to, due to their failure to comply with the tenant notification procedures.

Thus through no fault of the system their current rent levels were occasioned by their own inaction. They created similar situations for themselves in both of the other buildings for which they finally sought to obtain hardship rent increases. Those acts and ommissions include but are not limited to their failure to seek and obtain rent increases, and their failure to maintain essential services thereby having not insubstantial rent decreases imposed.

They now argue before this Court that the blame for their present circumstances lies solely with the system, ignoring their own forfeitures and delinquencies.

CONCLUSION

Appellants have failed to establish a cause of action upon which relief can be predicated. Appellants have not established that they have suffered a deprivation of either their property or property rights by the application of the state's rent laws and implementing regulations to them in the granting of rent increases under the statute, and therefore have no standing, to challenge the constitutionality of the rent laws. They have in fact pleaded no facts of demonstrable deprivation of protected

constitutional rights either through the operation of the rent laws or their implementation.

Their true underlying complaint, that they simply don't like operating in a rental housing market affected by governmental regulation presents no substantial federal question warranting judicial intervention on their behalf merely to enhance the value of their shareholder interests in a cooperative corporation, in derogation of explicit and wholly valid concerns of the state legislature. Ferguson v. Skrupa, 372 U.S. 726, 733 (1963) (Harlan J., concurring); Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 82 (1946), U.S. v. Carolene Products Co., 304 U.S. 144, 154 (1938); Block v. Hirsch, 256 U.S.

135, 158 (1921); I.L.F.Y. Co. v. City Rent and Rehab. Admin., 11 N.Y. 2d 480, 230 N.Y.S. 2d 986 (1962).

The appeal should be dismissed for want of a substantial federal question, or in the alternative the order of the Appellate Division, First Department entered April 7, 1987 should be affirmed.

Dated: Bronx, New York
March , 1988

Respectfully submitted,

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